GC/RPK:bhs

August 1, 2017

ELECTRONIC DELIVERY VIA EMAIL

Sara Creighton, Esq.
Counsel
American Oversight
1030 15th Street, N.W. Suite B255
Washington, D.C. 20005

RE: 17 FOI – 00053; 17 – App – 00005

Dear Ms. Creighton:

This responds to your email message to me of July 25, 2017, which you prepared in response to my letter of July 21, 2017 to Austin Evers of your firm. My July 21st letter responded to the appeal taken by American Oversight from the determination by NCUA's FOIA Officer that certain documents responsive to your initial FOIA request were being withheld on the basis that they were not "agency records" within the meaning of FOIA. I provided copies to your firm of a March 10, 2017, letter from Committee Chairman Jeb Hensarling to NCUA's then Acting Chairman J. Mark McWatters, along with portions of Acting Chairman McWatters' April 7, 2017, letter responding to Congressman Hensarling. I indicated in my July 21st letter that the production of these documents rendered your firm's appeal largely moot.

In your email message to me, you have noted your disagreement that this disclosure renders the appeal moot. You note that my July 21st letter did not specifically refute the argument made in your appeal to the effect that these documents are properly considered agency records that are subject to release under FOIA, and you therefore question whether a proper basis exists for the redactions that were made in Chairman McWatters' April 7th letter.

In your appeal, you asserted your disagreement that any records that would be responsive to your request could properly be considered not agency records subject to FOIA. In support of your position, you have cited a Supreme Court decision from 1989 that, you assert, stands for the proposition that documents that are either created or obtained by an agency and are under the control of the agency at the time the request under FOIA is received are properly deemed agency records that are subject to FOIA.[1] You have asserted that the documents in question in this case

[1] *U.S. Dep't. of Justice v. Tax Analysts*, 492 U.S. 136, 144-5 (1989).

satisfy both prongs of this test and so should be released. Your appeal goes on to assert that the responsive records in this case are used by NCUA in the ordinary course of its operations and decision-making, which reinforces, in your view, the conclusion that they are agency records.

Your reliance on *Tax Analysts* is misplaced. As the U.S. Court of Appeals for the D.C. Circuit noted in a recent case, application of the "control" element from *Tax Analysts* differs in cases that involve a connection between the records at issue and the U.S. Congress, a consideration that was not present in *Tax Analysts*.[2] It is well established that Congress is not subject to FOIA.[3] Indeed, courts have also acknowledged that, in view of Congress' role as overseer of federal regulatory agencies, Congress may specify that documents it creates, such as correspondence, remain subject to its "control," in the words of *Tax Analysts*, even when in the possession of an agency.[4] Congressional control may also extend to materials generated by an agency in response to a congressional directive or investigation.[5] In accordance with this line of cases, the principal consideration is whether Congress has manifested a clear intent to control the documents.[6] Accordingly, the dispositive question is not simply whether a given document is in the possession of the agency, or even whether it may have been created by the agency. The Supreme Court has expressly stated that even though materials may be physically located at an agency, such possession alone is not sufficient to render them "agency records."[7]

In accordance with the foregoing, there is ample basis in this case for the withholding of these documents. Congressman Hensarling, in his capacity as chairman of the Financial Services Committee of the U.S. House of Representatives, has designated all documents that relate to ongoing investigations initiated by the Committee, including documents entrusted to the NCUA in connection with any such investigation, as well as documents produced by NCUA in response to requests from the Committee, as congressional records. This clear manifestation of intent to retain control of the documents supports our conclusion that the documents are not subject to disclosure under FOIA.[8] Furthermore, internal correspondence and related materials prepared by

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[2] *Judicial Watch v. U.S. Secret Service*, 726 F. 3d 208, 222 (D.C. Cir. 2013).

[3] *See* 5 U.S.C. §551(1)(A); see also *United We Stand America, Inc. v. IRS*, 359 F. 3d 595 (D.C. Cir. 2004).

[4] *See, e.g., Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978) (holding that agency was acting merely "as a 'trustee' for Congress" in retaining copy of hearing transcript over which Congress "plainly" manifested intent to control by denominating it as "'secret'").

[5] *See Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 842-43 (D.C. Cir. 1980) (recognizing that agency-created records can become "congressional records"), *vacated in part on other grounds*, 455 U.S. 997 (1982); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. at 12 ("Even documents created by the agencies themselves may elude FOIA's reach if prepared on request of Congress with confidentiality restrictions."), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996).

[6] *ACLU v. CIA*, 823 F. 3d 655, 658 (D.C. Cir. 2016); *cert. denied* 2017 WL 1427589 (April 24, 2017) ("When Congress creates a document and then shares it with a federal agency, the document does not become an "agency record" subject to disclosure under FOIA if Congress has manifested a clear intent to control the document.") (internal citations omitted).

[7] *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *see also Tax Analysts, supra*, at 144-45 ("agency records" extends only to those documents an agency "create[s] or obtains" and "controls" at the time of the FOIA request).

[8] *See, e.g., Paisley v. CIA*, 712 F.2d 686, 693 (D.C. Cir. 1983) (noting that if "Congress has manifested its own intent to retain control [of records in agency's possession], then the agency by definition -- cannot

NCUA personnel in connection with the development of Chairman McWatters' April 7th response letter would qualify for exemption under (b)(5) of FOIA, based on their deliberative, pre-decisional nature or, as applicable, on the attorney-client privilege, even if they did not qualify as Congressional records.[9] The determination by the NCUA FOIA Officer correctly reflects this conclusion, and your request was properly denied. Accordingly, your appeal is also denied.

Pursuant to 5 U.S.C. §552(a)(4)(B) of FOIA, you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court where you reside, where your principal place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001 E-mail: ogis@nara.gov
Web: https://ogis.archives.gov
Telephone: 202-741-5770; Toll-free: 877-684-6448
Fax: 202-741-5769

Sincerely,

Michael J. McKenna
General Counsel

17-0728

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lawfully 'control' the documents . . . and hence they are not 'agency records'"), vacated in part on other grounds, 724 F.2d 201 (D.C. Cir. 1984) (per curiam); *ACLU v. CIA, supra,* at 662-63.

[9] 5 U.S.C. §552(b(5);